PRIVY COUNCIL REPORT

GOVERNMENT OF MALAYSIA v. LEE HOCK NING

[P.C. (Lord Wilberforce, Lord Hodson, Lord Kilbrandon, Lord Salmon & Sir Seymour Karminski) June 19, 1973]

[Privy Council Appeal No. 27 of 1972]

Public Authorities — Limitation of time for filing proceedings — Claim under contract — Contract entered into by Government for construction of primary schools with private contractor — Whether contract entered into in execution of any public duty or authority — Breach of private contract — Public Authorities Protection Ordinance, 1948, s. 2.

Contract — Building contract — Contract entered into by Government — Breach of — Action to recover monies due and owing — Public Authorities Protection Ordinance, 1948.

The respondent had claimed payment of monies due under a series of building contracts entered into between him and the appellants, the Government of Malaysia for the building of primary schools. At the trial the appellants had pleaded section 2 of the Public Authorities Protection Ordinance, 1948. The trial judge held that the respondent's claim was barred but on appeal the Federal Court ([19/2] 2 M.L.J. 12) held that the contractual obligation in this case was not in pursuance of a public duty and therefore did not come within the provisions of section 2 of the Public Authorities Protection Ordinance. The appellants appealed to the Privy Council.

Held: in this case the right of the respondent was correlated not with a statutory right or duty which was the provision of education but with the obligations entered into by the appellants in their contract with the respondent and accordingly the respondent's claim was not barred by the Public Authorities Protection Ordinance.

Cases referred to:-

(1) *Milford Ducks Co.* v. *Milford Haven U.D.C.* (1901) 65 J.P. 483.

(2) *McPhie* v. *Corporation of Greenock* (1904) 7 F. 246.

(3) *Sharpington* v. *Fulham Guardians* [1904] 2 Ch. 449.

(4) *Bradford Corporation* v. *Myers* [1916] A.C. 242.

(5) *Griffths* v. *Smith* [1941] A.C. 170 at p. 208.

(6) *McManus* v. *Bowes* [1938] 1 K.B. 98.

(7) *Compton* v. *West Ham Borough Council* [1939] 1 Ch. 771.

(8) *Mountain* v. *Bermondsey Borough Council* [1942] 1 K.B. 204.

(9) *Bennett* v. *Borough of Stepney* (1912) 107 L.T.R. 383.

(10) *Firestone Tire & Rubber Co. (S.S.) Ltd.* v. *Singapore Harbour Board* [1952] M.L.J. 145, P.C.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Robert Gatehouse Q.C. and *Nicholas Lyell* for the appellants.

Eugene Cotran for the respondent.

Lord Kilbrandon (delivering judgment of the Board): The legislature has conferred certain powers, and laid certain duties, upon the appellants in relation to education. Act No. 43 of 1961 provides as follows: —

"20. It shall be the duty of the Minister to secure the provision of primary education in

(a) national primary schools;

(b) national-type primary schools.

21. (1) The Minister may, subject to the provisions of this Act, establish national primary schools . . .".

In order to carry out these functions, the appellants entered into contracts with the respondent for the construction of class-rooms etc. at primary schools. It is not necessary, in the view their Lordships take of the appeal, to go into details about the contracts, to particularise the various sums said to be due under them, or to trace through the courts below the various claims and counter-claims arising thereon. The question with which their Lordships are concerned is, a sum having fallen due from the appellants to the respondent under a contract which was completed on 5th February 1964, and the writ claiming payment being dated 14th June 1965, is the respondent's claim barred in virtue of the provisions of the Public Authorities Protection Ordinance 1948 section 2? That section substantially reproduces section 1 of the United Kingdom Public Authorities Protection Act 1893, as amended by the Limitation Act 1939 section 21(1), and the appeal has accordingly been presented on the basis of the law of the United Kingdom as it was until the passing of the Law Reform (Limitation of Actions, &c.) Act 1954.

Section 2 of the Public Authorities Protection Ordinance 1948 is in the following terms: —

"2. Where, after the coming into force of this Ordinance, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within twelve months next after the ceasing thereof;

(b) whenever in any such suit or action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client;".

The question thus is, whether the failure by the appellants to pay the sum due under the contract was neglect or default in the execution of a written law, duty or authority.

It must be said at once of the Public Authorities Protection Act that from the first it was a Statute which

> "there were none to praise,
> And very few to love".

It has been strictly construed. The early view was that the intention of Parliament was to give protection against claims for damages in tort, and that actions upon contract did not come within its scope. In *Milford Docks Co.* v. *Milford Haven U.D.C.*[1] Romer L.J. said that the Act "does not apply to actions for the price of goods sold and delivered and for work and labour done." Three years later Lord Young expressed himself more strongly:

"Now, I know of no principle or authority which could have influenced the legislature to place public bodies in a favoured position in regard to liability for breach of contract, and consequently in construing this section I decline to attribute such an intention to the legislature"; *McPhie* v. *Corporation of Greenock.*[2]

These expressions of opinion cannot now be accepted as stating the law. In cases arising out of breach of contract, as in cases arising out of tort, the question is the same, although it may be more difficult to find the answer in the former than in the latter class: is the

suit one in respect of a neglect (*e.g.* negligence) or default (*e.g.* breach of contract) in the execution by the authority of law, duty or authority? The phrase "execution of duty or authority" is somewhat inelegant, but it is employed, in their Lordships' view, in order to make clear that no distinction is to be made, in classifying the neglect or default, according as it was committed in the exercise of a positive duty laid or a permissive power conferred on the authority.

In the long series of cases to which their Lordships were referred, there is no doubt that for present purposes the most significant is *Sharpington* v. *Fulham Guardians*,[3] and that for several reasons. First, the facts are virtually indistinguishable from those in the present case. The Guardians had entered into a contract with the plaintiff for the carrying out of building work to provide a children's home, which provision was within their statutory powers and duties. The plaintiff claimed a sum which he said was due under the contract, and was met with a defence under the Act. Secondly, Farwell J. in his judgment accepted that contracts might fall within the scope of the Act, so that breach became a protected default, but he distinguished between a suit arising out of a private claim under a contract and one arising out of failure to perform a public duty. Thirdly, his judgment was emphatically approved by the House of Lords in *Bradford Corporation* v. *Myer*.[4] The passage in which the learned judge sets out the governing principle is as follows: —

"The public duty which is here cast upon the guardians is to supply a receiving house for poor children; a breach or negligent performance of that duty would be an injury to the children, or possibly to the public, who might be injured by finding the children on the highway. In order to carry out this duty they have power to build a house or alter a house, and they accordingly entered into a private contract. It is a breach of this private contract that is complained of in this action. It is not a complaint by a number of children or by a member of the public in respect of the public duty. It is a complaint by a private individual in respect of a private injury done to him. The only way in which the public duty comes in at all is, as I have pointed out, that if it were not for the public duty any such contract would be *ultra vires*. But that would apply to every contract. I cannot find any ground for saying that this particular contract comes within the Act. I think it is clear that what is complained of is a breach of a private duty of the guardians to a private individual. The result is that, so far as this section is concerned, the action will lie."

Those principles, approved as they have been by the House of Lords, are decisive of this appeal. It was argued that later cases have in some way reduced their authority, but an examination of those cases does not bear that out. It is possible to see, in all the cases in which the neglect complained of was pure breach of contract, that the constitution of the contract itself was a statutory duty either imposed on the authority or which the authority had imposed upon itself under statutory powers conferred in that behalf. As Lord Porter put it in *Griffiths* v. *Smith*,[5] they furnish examples of authorities performing a public duty through the medium of a contract, rather than, as in the present case and in *Sharpington*, entering into a private contract in pursuance of an Act of Parliament. Thus in *McManus* v. *Bowes*[6] the authority were said to be in breach of their contract with a medical officer; they were under a statutory duty to employ a medical officer, and given statutory powers to dismiss him. In *Compton* v. *West Ham Borough Council*[7] a claim for salary by a relieving officer — an appointment which the statute required the Council to make — was held protected. In both these cases the default lay in failing to carry out the duties which had been laid upon the authority, and were clearly therefore committed in the execution of their duty. In *Mountain* v. *Bermondsey Borough Council*[8] the statute enjoined the payment of certain expenses, incurred by the plaintiff in the carrying out of his statutory duties. In *Bennett* v. *Borough of Stepney*[9] the statute required the authority to repay the plaintiff's superannuation contributions; failure to do so was default in carrying out a public duty. In none of these cases, accordingly, was the contract between the plaintiff and defendant a private contract for the performance of some work or service within the powers of the authority but other than work or service directed or empowered by the statute to be done. In every case the non-performance of the contract was a breach of the authority's statutory obligation, and therefore a default within the meaning of section 1. So also in *Bradford Corporation* v. *Myers, supra*, the contract which the authority made with the plaintiff, though *intra vires* and made in relation to the statutory powers of supplying gas, was a private contract in as much as the making of it was not a statutory function of the authority, but subsidiary or ancillary to the carrying out of those functions. As it was put by Lord Buckmaster L.C. at page 246:

"The act complained of was negligence in breaking the respondent's window, and that arose in the execution of a private obligation which the appellants owed by contract to the respondent, for breach of which no one but the respondent was entitled to complain."

And if there had been no element of negligence, for example if the purchaser had claimed damages for delivery of a defective article, the result would be the same.

The point was put rather differently by Lord Shaw of Dunfermline, in a passage described by Lord Porter in *Griffiths* v. *Smith, supra*, at page 208 as "the true position", as follows:

"If there be a duty arising from statute or the exercise of a public function, there is a correlative right similarly arising. A municipal tramway car depends for its existence and conduct on, say, a private and many public Acts, and the corporation in running it is performing a public duty. When a citizen boards such a car, in one sense he makes, by paying his fare, a contract; but the boarding of the car, the payment of the fare, and the charging of the corporation with the responsibility for safe carriage are all matters of right on the part of the passenger, a public right of carriage which he shares with all his fellow citizens, correlative to the public duty which the corporation owes to all. Similarly, when a municipality, by virtue of private and public statutes, carries on a gas undertaking, the public duty of manufacture and supply finds its correlative in the right of the consumer, a public right which he has in common with all his fellow householders, to supply and to service. In both of these cases, accordingly, the Public Authorities Protection Act applies.

But where the right of the individual cannot be correlated with a statutory or public duty to the individual, the foundation of the relations of parties does not lie in anything but a private bargain which it was open for either the municipality or the individual citizen, consumer, or customer to enter into or to decline. And an action on either side founded on the performance or non-performance of that contract is one to which the Protection Act does not apply,

because the appeal, which is made to a court of law, does not rest on statutory or public duty, but merely on a private and individual bargain."

Here the right of the contractor, as in *Sharpington*, is correlated not with a statutory right or duty, which is the provision of education, but with the obligations entered into by the authority in their contract with him.

That the question whether in making a contract the authority were exercising powers or carrying out duties is irrelevant is seen from *Firestone Tire & Rubber Co. (S.S.) Ltd.* v. *Singapore Harbour Board.*[10] The board lost some tyres which had been entrusted to them for warehousing — a function they were entitled but not bound to perform by the Ordinance creating them. In the words of Lord Tucker, delivering the opinion of the Board at page 149, having chosen to act as warehousemen themselves rather than let the warehouses to others,

"they did not thereby cease to function as a harbour board and undertake some purely subsidiary activity of a non-public nature. They were supplying facilities essential to the shipping community in one of the ways authorised by the Ordinance."

In other words, to use Lord Shaw of Dunfermline's test, the rights of their customers were correlated with a statutory duty owed to them as members of the commercial community in whose interests the statutory functions were to be performed, and not merely with obligations in a contract entered into as an auxiliary to the carrying out of those functions, in which no one not a party to that contract could be concerned.

It has been more than once pointed out that it is difficult, if not impossible, to lay down any general principle determinative of these questions. Nevertheless, their Lordships are satisfied that the present case falls upon the same side of the line as did *Sharpington* v. *Fulham Guardians, supra,* and that the respondent's claim is not barred by the Public Authorities Protection Ordinance.

The only other question to which it is necessary to refer is the respondent's complaint that he has not been given an opportunity to prove the damages which he claims, stated at a sum of $6,500, arising out of the appellants' refusal to execute the contract referred to in Civil Suit, No. 222 of 1965. If such an opportunity were to be given, it would involve sending the case back for re-trial at first instance. Their Lordships are satisfied that it was in the exercise of a sound discretion that the Federal Court declined to take this step. The court evidently took the view that substantial justice was achieved by ignoring both the respondent's claim and the appellants' counterclaim, and giving the respondent generous treatment in the matter of costs, which would normally have been awarded against him as a consequence of his failure to take, at first instance, the point of law on which he was ultimately successful.

Their Lordships will accordingly advise the Head of Malaysia that the appeal should be dismissed and that the appellants should pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Stephenson Harwood & Tatham; Graham Page & Co.*

SINGAPORE REPORTS

TEY LENG YEOW v. TAN POH HING & ANOR.

[O.C.J. (Winslow J.) January 24, 1973]

[Singapore — Divorce No. 146 of 1972]

Family Law — Divorce — Custody of child — Originally given to father in uncontested petition — Subsequent application by mother — Control and management of child given to mother.

In this case the petitioner had obtained a decree *nisi* for divorce in an uncontested petition. Custody of a child of the marriage, a boy of eight years, was given to the father. Subsequently the mother applied to be heard on the question of custody and the learned judge gave her leave to file an entry of appearance. On further consideration,

Held: although custody of the child had been given to the father, the control and management of the child would be given to the mother, with whom he had been all his life, as this would be in his best interests.

[Editorial Note: An appeal to the Court of Appeal (Civil Appeal No. 59 of 1972) against the split order in this case was dismissed by the Court (Wee Chong Jin C.J., Kulasekaram and Tan Ah Tah JJ.) on May 14, 1973 and the cross appeal was heard on May 15, 1973 but no order made.]

DIVORCE.

J. Tan Chor-Yong for the petitioner.

Joshua Lim (Deputy Director of Legal Aid) for the respondent.

Winslow J.: On 24th August, 1972 I ordered custody of the boy, aged 8, to the petitioner, his father, after granting the latter a decree nisi to be made absolute after 3 months on an uncontested petition. The boy was born after the respondent, the mother, had left the petitioner and has been brought up by his mother all along. The father saw him first in 1970 and had been ordered to pay maintenance in varying amounts since 1st July, 1970.

The boy was schooling at Sin Min School until his father removed him from that school after the decree nisi.

On 2nd October, 1972 I made an order for the father to send him back to that school as the boy's studies had been forcibly brought to an end. At the same time I gave leave to the respondent to file an entry of appearance to enable her to be heard on custody because she seemed to have misunderstood the position when she decided not to contest the divorce.

On 13th November 1972 I was informed that the father had, far from sending the boy back to Sin Min School, sent him to another school in defiance of my order.

The father did not impress me in the slightest as a person who could be trusted then to do what was best for the child and I regretted very much having made an order for custody in his favour in the first place which I would not have done had I been aware of the mother's views. I gave control and management of the child to the mother with whom he had been all his life as I considered that this would be in his best interests. I am aware that the mother is living with the co-respondent but she did not appear on the